

UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION

LLOYD TRACKWELL,  
Plaintiff,  
v.  
VICTORIA MOFFET,  
Defendant.

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No. 3:14-cv-1701-HU

**FINDINGS AND  
RECOMMENDATION**

HUBEL, Magistrate Judge:

Pro se Plaintiff Lloyd Trackwell ("Trackwell") filed this legal malpractice action against Defendant Victoria Moffet ("Moffet") on October 24, 2014, after he was convicted by a jury in Wallowa County Circuit Court of two counts of misdemeanor stalking and two counts of contempt of court. (See Compl. ¶¶ 6-10.) As explained in his complaint, Trackwell "immediately appealed his conviction and as of [October 24, 2014] . . . that appeal remain[ed] pending before the Oregon Court of Appeals." (Compl. at 3.) Now before the Court is Trackwell's application (Docket No. 2) for leave to proceed in forma pauperis.

**LEGAL STANDARD**

It settled law that a district court must perform a preliminary screening of an in forma pauperis complaint and dismiss any claims which: (1) fail to state a claim on which relief may be granted; (2) are frivolous or malicious; or (3) seeks monetary relief against a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2)(B); see also *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000) (concluding that § 1915(e)(2)(B) applies to non-prisoners).

In order to state a claim for relief, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). When reviewing the sufficiency of a complaint filed by a pro se litigant, the court must liberally construe the pleading and accept as true all of the factual allegations contained therein. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). But "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions," *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Rather, stating a claim requires "the plaintiff [to] plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

Along similar lines, a district court may dismiss a claim as factually frivolous when the facts alleged "lack[] an arguable basis in law or in fact," *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), or when they "rise to the level of the irrational or the

1 wholly incredible, whether or not there are judicially noticeable  
 2 facts available to contradict them," *Denton v. Hernandez*, 504 U.S.  
 3 25, 33 (1992). A claim may also "be dismissed as frivolous where  
 4 a defense is obvious on the face of the complaint." *Harris v.*  
 5 *Rodriguez*, No. 1:12-cv-00891, 2012 WL 4210118, at \*4 (E.D. Cal.  
 6 Sept. 18, 2012) (citing *Franklin v. Murphy*, 745 F.2d 1221, 1228-29  
 7 (9th Cir. 1984)).

### 8 DISCUSSION

9 In addition to his complaint, application to proceed in forma  
 10 pauperis and supporting affidavit—all of which were filed on the  
 11 district court's electronic filing system—Trackwell mailed a  
 12 letter to the Court in anticipation of his complaint potentially  
 13 being dismissed at the screening stage. That letter—which is  
 14 attached as Exhibit 1 to this Findings and Recommendation, and  
 15 which Trackwell represents was also sent (i.e., carbon copied) to  
 16 the yet-to-be-served Defendant Moffet—states:

17 I have filed a legal malpractice case styled Trackwell v.  
 18 Moffet and am seeking leave to proceed in forma pauperis.  
 19 I am aware that the court screens cases filed by [p]ro  
 20 [s]e litigants and I write because I wanted to make sure  
 21 that the court is aware that I have researched this case  
 22 diligently and I believe that there is a sound legal  
 23 basis for the position I take in this case.

24 Assuming that I am granted leave to proceed, I intend to  
 25 file a motion to stay this case as soon as I have  
 26 obtained service on the Defendant. I point that out to  
 27 the court because . . . I am aware of caselaw in Oregon  
 28 that indicates the cause of action for legal malpractice  
 in a criminal case does not accrue until a criminal  
 appeal and post conviction remedies have been exhausted.  
 However there are recent decisions that suggest that the  
 Oregon Supreme Court is amenable to a change in that  
 position, e.g., *Drollinger v. Mallon*, 3[5]0 Or. 652, 260  
 P.3[d] 482 (Or. 2011). I intend to argue in this case  
 that the current view [of the Oregon Supreme Court]  
 violates the Equal Protection Clause by subjecting  
 certain classes of legal malpractice [p]laintiffs to an  
 additional burden and that the rule articulated in

1 Gebhardt v. O'Rourke P.C., 444 Mich. 535, 548, 510 N.W.2d  
2 900, 906 (1994) is consistent with constitutional  
3 principles and addresses the concerns addressed by the  
4 California Supreme Court in *Coscia v. Mc[K]enna & Cuneo*,  
108 C. Rpt[r]. 2[d] 471, 25 Cal. 4th 1194, 25 P.3[d] 670  
(2001).

5 (Finding & Recommendation, Ex. 1 at 1.)

6 Plaintiff's letter appears to reference the Oregon Supreme  
7 Court's seminal decision in *Stevens v. Bispham*, 316 Or. 221 (1993),  
8 where they held that, for statute of limitations purposes, a legal  
9 malpractice claim could not accrue "until the plaintiff has been  
10 exonerated of the criminal offense through reversal on direct  
11 appeal, through post-conviction relief proceedings, or otherwise."  
12 *Id.* at 223. The Oregon Supreme Court explained:

13 [F]or one convicted of a criminal offense to bring an  
14 action for professional negligence against that person's  
15 criminal defense counsel, the person must, in addition to  
16 alleging a duty, its breach, and causation, allege 'harm'  
in that the person has been exonerated of the criminal  
offense through reversal on direct appeal, through  
post-conviction relief proceedings, or otherwise. . . .

17 Defendant argues that plaintiff's claim accrued and  
18 the statute of limitations began to run on March 31,  
19 1987, when plaintiff entered his no-contest plea. At that  
20 time, defendant argues, plaintiff was both harmed and  
21 dissatisfied with defendant's representation. Our  
22 previous discussion of the elements of a professional  
23 negligence action brought in circumstances like these  
24 demonstrates defendant's error. Plaintiff could not have  
25 brought this action until he had suffered legally  
26 cognizable harm. Plaintiff had not suffered such harm at  
27 defendant's hands in this case unless and until he was  
28 exonerated of the criminal offense through reversal on  
direct appeal, through post-conviction relief  
proceedings, or otherwise. Here, he legally was  
exonerated by a means that qualifies as 'otherwise.' But  
the date of that exoneration—the date on which his  
conviction was set aside and he was released [after  
another man confessed to the crime]—was well within two  
years of the date on which the present action was filed.  
The trial court's ruling that the harm had occurred more  
than two years before the complaint was filed therefore  
was error.

1 *Id.* at 238-39 (internal citation omitted).

2       Eighteen years later, in *Drollinger v. Mallon*, the Oregon  
3 Supreme Court "conclude[d] that *Stevens*, a case addressing the  
4 statute of limitations in a malpractice action brought by a former  
5 criminal defendant against *trial* counsel in the underlying case,  
6 d[id] not preclude this convicted plaintiff from pursuing a  
7 malpractice action against post-conviction counsel." 350 Or. at  
8 652. The Oregon Supreme Court distinguished *Stevens*, stating,  
9 among other things:

10       Although the statutory provision for post-conviction  
11 relief is one aspect of the overall legislative scheme  
12 for ensuring the fairness and accuracy of the criminal  
13 convictions and sentences, post-conviction proceedings  
14 themselves are civil in nature and they are not subject  
15 to the scheme of protections that *Stevens* discusses.  
16 Given that the panoply of constitutional and statutory  
17 protections for protecting criminal defendants (and,  
18 particularly, the mechanisms for assuring the effective  
19 assistance of counsel), are not operative in  
20 post-conviction proceedings, the *Stevens* court's interest  
21 in 'respecting and not hindering' the policy choice that  
22 inheres in the overall scheme of protections simply is  
23 not a paramount consideration in defining the elements of  
24 claims that arise in that context.

25       . . . [Moreover,] *Stevens* is premised on the  
26 assumption that the legislature's scheme of protections  
27 for criminal defendants includes one or more mechanisms  
28 for correcting any wrongs suffered by a criminal  
defendant as a result of his or her attorney's  
constitutionally or statutorily inadequate  
representation. In *Stevens*, the required exoneration was  
available 'through direct appeal, through post-conviction  
relief proceedings, or otherwise.' However, there is no  
express statutory mechanism in Oregon law for obtaining  
'exoneration' from a denial of post-conviction relief  
caused by the inadequacy of post-conviction counsel. In  
light of the absence of any realistic mechanism for  
obtaining 'exoneration' from the results of  
post-conviction counsel's inadequacy, extending the  
exoneration requirement of *Stevens* to malpractice actions  
against post-conviction counsel would create an  
insurmountable and arbitrary bar to relief that does not  
exist with respect to malpractice claims against criminal  
defense counsel.

1 *Id.* at 662 (ellipses and footnote omitted).<sup>1</sup>

2 It is well settled that "the views of [a] State's highest  
3 court with respect to state law are binding on the federal courts."  
4 *Cunningham v. California*, 549 U.S. 270, 306 n.8 (2007) (Alito, J.,  
5 dissenting) (citation omitted); see also *Thomas v. Bergstedt*, 15 F.  
6 App'x 413, 414 (9th Cir. 2001) ("Under 28 U.S.C. § 1257 and the  
7 *Rooker-Feldman* doctrine, only the United States Supreme Court has  
8 jurisdiction to review the constitutionality of final decisions of  
9 state courts. Lower federal courts lack such authority.")  
10 (internal citations omitted). With that in mind, it's clear from  
11 the Court's reading of *Stevens* and *Drollinger* that: (1) *Stevens*  
12 remains good law from Oregon's highest court; and (2) *Stevens* would  
13 control in the instant case since Trackwell, a former criminal  
14 defendant, is attempting to bring a legal malpractice claim against  
15 trial counsel, not post-conviction counsel, even though he has not  
16 "been exonerated of the criminal offense through reversal on direct  
17 appeal, through post-conviction relief proceedings, or otherwise."

18 Accordingly, Trackwell's complaint should be dismissed without  
19 prejudice. *Cf. Sandgathe v. Jagger*, 165 Or. App. 375, 379 (2000)  
20 ("[W]e agree with plaintiff that, in these circumstances, dismissal  
21 with prejudice was erroneous. We so conclude because such a  
22 dismissal would improperly preclude plaintiff from pursuing his  
23 malpractice claims against defendant if his criminal convictions  
24 are ultimately collaterally overturned.").

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27 <sup>1</sup> Regardless of the *Drollinger* decision, federal habeas relief  
28 is a realistic mechanism for obtaining "exoneration" from the  
results of post-conviction counsel's inadequacy.

1 **CONCLUSION**

2 Trackwell's application (Docket No. 2) to proceed in forma  
3 pauper is granted solely for the purposes of screening his  
4 complaint, and for the reasons stated above, this action should be  
5 dismissed without prejudice.

6 **SCHEDULING ORDER**

7 The Findings and Recommendation will be referred to a district  
8 judge. Objections, if any, are due **January 5, 2015**. If no  
9 objections are filed, then the Findings and Recommendation will go  
10 under advisement on that date. If objections are filed, then a  
11 response is due **January 23, 2015**. When the response is due or  
12 filed, whichever date is earlier, the Findings and Recommendation  
13 will go under advisement.

14 Dated this 15th day of December, 2014.

15 /s/ Dennis J. Hubel

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DENNIS J. HUBEL  
17 United States Magistrate Judge  
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